IN THE

Supreme Court of the United States.

October Term 1885. No. 1008.

WILLIAM S. HASSALL, Trustee,

Appellant.

vs.

A. W. WILCOX,

Appellee.

Appeal from the Circuit Court of the United States for the Western District of Texas.

BRIEF FOR APPELLANT.

SILAS W. PETTIT,

Solicitor for Appellant.

In the Supreme Court of the United States.

OF OCTOBER TERM, 1885. No. 1008.

WILLIAM S. HASSALL, TRUSTEE, *Appellant*,

vs.

A. W. WILCOX, *Appellee*.

Appeal from the decree of the Circuit Court of the United States for the Western District of Texas.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal by William S. Hassall, trustee for the bondholders secured by the first mortgage of the Rio Grande & Pecos Railway Company, from a decree of the Circuit Court of the United States for the Western District of Texas, awarding, out of the proceeds of sale of the railroad company's property and franchises, payment to the appellee, Dr. A. W. Wilcox, of the sum of $5,526.78, in preference to the said first mortgage bondholders.

An orderly statement of the facts and proceedings shown by the record relating directly to the appellee's claim, will, it is believed, assist the Court in ascertaining the precise question in dispute and in deciding the cause. The references are to the top-paging of the printed record.

The first mortgage of the Rio Grande & Pecos Railway Company, a corporation of the State of Texas, secured upon its railroad and coal mines and franchises was made on the 15th May, 1882, to the Mercantile Trust Co., of New York, to secure bonds amounting to $600,000. Record, pp. 4–13.

On the 14th of April, 1884, default having been made in payment of the interest due on the bonds in December 1883, suit was brought by C. B. Wright, a first mortgage bondholder, and the same day a receiver was appointed with power to take possession of and operate the railroad and mines pending the suit. Record, p. 14.

This proceeding was duly prosecuted. William S. Hassall, the appellant, was duly substituted as trustee in place of the Trust Company, and as such intervened and became the plaintiff therein, and by decree of the 13th of October, 1884, the Circuit Court in substance adjudged, and decreed as follows: Record, p. 49.

a. That receiver's certificates authorized and issued to the amount of $50,000 and interest, were the first lien on the railway company's road, mines and franchises.

b. That the several liens decreed, or to be thereafter decreed, to have preference over the mortgage were the second lien thereon.

c. That the mortgage of the 15th of May, 1882, in the Bill of Complaint mentioned, was the next lien, and that the amount due thereon was $637,260.

d. That the Rio Grande & Pecos Railway Company should pay said several sums, and in default thereof that the trustee should sell the mortgaged road, mines and franchises, and make conveyance to the purchaser who should,

"Thereupon hold the same free and discharged from all liens and incumbrances whatever and from any claim or demand of the Rio Grande & Pecos Railway Company or of any trustee under the mortgage executed to secure

the first mortgage bondholders therein or thereto by way of equity of redemption or otherwise, and the said Rio Grande & Pecos Railway Company shall from thenceforth be absolutely debarred and foreclosed of and from any such demand or claim." Record, p. 52.

At the sale made under this decree the sum of $100,000 was realized, and the controversy now to be determined is whether out of the residue of the fund left after the payment of the receiver's certificates, &c., the claim of the appellee is entitled to payment in preference to that of the appellant as trustee for the first mortgage bondholders.

An act of the Legislature of the State of Texas, passed in 1879, a full copy of which is printed at the end of this Brief, enacts:

"That all mechanics, laborers and operatives, who may have performed labor in the construction or repair of any railroad, locomotive, car or other equipment to a railroad, or who may have performed labor in the operating of a railroad and to whom wages are due or owing, shall hereafter have a lien prior to all others upon such railroad and its equipment for such wages as are unpaid." Provided, however, by sec. 4, that such claims must be enforced within one year after the labor has been performed.

Counsel for appellant can find no statute of the State of Texas conferring a lien for wages of miners or persons employed in mining, and therefore asserts there is none.

The contention of the appellee in the Court below was that he was entitled by assignment or by subrogation, for it does not clearly appear which, to the lien granted to laborers by the above statute.

The nature of the claim of the appellee and the proceedings thereon, as shown by the record, may be stated as follows:

A note and warrant of attorney given him by the railroad company, viz.: Record, p. 27.

"LAREDO, TEXAS, January 12th, 1884.

The Rio Grande & Pecos Railway Company, for value received, hereby promises to pay A. W. Wilcox or bearer, on demand, the sum of fifty-five hundred and twenty-six dollars 78-100 ($5526.78), *for services and for amount advanced on claims for labor* performed in the construction and maintenance of the Rio Grande & Pecos Railroad, with interest at 10 per cent., per annum until paid, and upon default in payment, A. L. McLean is hereby authorized, in the name of the said Rio Grande & Pecos Railway Company, to confess judgment in any court of competent jurisdiction, hereby waiving a citation and service thereof.

(Signed) THE RIO GRANDE & PECOS RAILWAY COMPANY,
By A. C. HUNT, the President."

(Corporate Seal of the Company).

A petition by said A. W. Wilcox to the District Court of Webb county, Texas, alleging the ownership of the above note, Record, p. 21, and on the 27th March, 1884, judgment entered by confession thereon for $5526.78, with interest, &c.

It is also stated in the record of said judgment, as follows:

"It is further ordered by the Court that the plaintiff have a lien on the said Rio Grande & Pecos Railroad Company and its equipments, to secure the payment of this judgment, and that said railroad and its equipments, or so much thereof as may be necessary, be sold to satisfy this judgment." Record, p. 20.

On the 24th of June, 1884, the appellee presented his demand to S. G. Newton, Esq., special master in the foreclosure suit above mentioned, and claimed that

"His said lien established by said judgment before the institution of this suit or the appointment of a receiver is prior to the first mortgage bonds, and is entitled to

preference of payment out of the earnings and proceeds of said railway," &c. Record, p. 19.

On the 4th of September, 1884, Mr. C. B. Wright, the plaintiff in the foreclosure suit above mentioned, filed with the master "objections to the allowance" of appellee's claim, Record, p. 23, and on same day the appellee filed with the master a "Response to complainant's objections." Record, p. 24.

Testimony was then, on the 5th of September, taken before the master, viz.:

Mark Shaffenburg, Record, p. 21, recalled, p. 22, and A. W. Wilcox (the appellee), Record, p. 22, and Exhibits "C" and "D," Record, pp. 25–40.

It appears from this, as well also from the recitals in the mortgage and in several orders of the Court relating to the receivership, that the Rio Grande & Pecos Railway Company owned certain coal lands and operated thereon three mines, to wit, the San Thomas, Hunt and Shaft No. 1, and mined and sold coal therefrom.

Dr. Wilcox, the appellee, admitted that in the amount for which the note on which he had recovered judgment was given him, there was included some payments for labor in the mines operated by the company, which fact was also shown by the accounts exhibited in the case, and that part of the money was advanced by him to pay freights due by the railroad company, and while he denies that any merchandise was included therein, a reference to Exhibit "D" shows a number of such items, as also do the separate accounts with the several mines. Record, pp. 40–41–42.

Analysis of the vouchers, copies of which are printed in the record on pp. 27 to 40, fails to disclose their exact relations to the accounts presented. They amount in the aggregate to $1115.46 in United States currency, but of this only $382.21 can be held to be for labor in the construction or operation of the railroad. There is absolutely no evidence to be found in the record of how much of the

amount claimed to be due by appellee is for wage-claims bought or paid by him and due for labor done in the construction, repair or operation of the railroad, or its equipment, within one year prior to 14th April, 1884, the date when the receiver was appointed, except only the following vouchers:

Page of Record	Name	Consideration			Amount.
28	Martine Lena,	My time,			$13 25
29	Geo. Thompson,	Carpenter,			42 25
30	Same,	do			87 66
	Marcos Hernandez	Labor Carbone Station, Mexican Cy.	33 19		
31	Antonio Rodrigues	Labor	24 37		
	H. Lopez,	"	4 05		
	A. Vidannie,	"	22 82		
	J. Bannor,	"			24 75
32	J. Salas,	"	7 50		
			91 93	@ 3	80 44
	M. Norrice,	"			6 40
	M. Reyes,	"			22 50
	Mike Grimes,	Labor on track,			14 28
33	James Moran,	"			4 77
34	Ben Brown,	"			3 75
	Wm. H. Heston,	Locomotive Fireman,			18 02
	R. Pond,	Labor on track			6 02
35	Peter Renner	"			11 25
36	Filippe O. Varrinas,	Labor on section			2 25
37	Juan Morales,	Labor			7 50
	Pat Collins,	"			11 52
	R. Suares,	Labor on track			13 90
38	S. Alumoras,	"			5 05
39	Mathias Macias,	"			6 75
	Total,				$382 21

On the 27th September, 1884, the learned master filed his report, together with the testimony and exhibits, and found and reported upon this evidence that A. W. Wilcox had a valid claim against the railroad company for the amount of the judgment rendered in the State Court of Webb county, to wit, $5526.78, but that there was included therein amounts not preferred as a lien under the Act of 1879 (apparently because there was no evidence by which he could distinguish how much of the amount of the judgment was for liens preferred by law, and how much was not so preferred), and found and reported, "that he has no lien prior to that of the first mortgage bondholders." Record, p. 45.

To this report and finding the appellee filed exceptions, Record, p. 45, and on the 31st of October, 1884, the United States Circuit Court, per Turner, J., sustained said exceptions, and decreed that the said sum of $5526.78 should be paid the appellee out of the funds in the hands of the receiver, or failing these, then out of the proceeds of the sale of the mortgaged property when sold. No opinion was filed. Record, p. 56.

On the 6th of December, 1884, a petition for rehearing of the claim of appellee was allowed to be filed and ordered to stand over, Record, p. 57, but finally, on the 19th of May, 1885, decree was made, allowing the claim of A. W. Wilcox for $5526.78 as a lien prior to the lien of the first mortgage upon the road and property of the Rio Grande & Pecos Railway Company, Record, p. 62, and from that decree this appeal is taken.

ASSIGNMENTS OF ERROR.

I. The learned Court erred in its decree of 31st October, 1884, allowing the exceptions of the appellee to the report of the learned master.

II. The learned Court erred in its decree of 31st October, 1884, in awarding payment to the appellee of his claim of $5526.78 with interest thereon from January 13, 1884, at the rate of 10 per cent. per annum out of the proceeds of sale of the Rio Grande & Pecos Railway as a first lien on said proceeds, and to be paid in like manner as the receiver's certificates theretofore ordered to be paid.

III. The learned Court erred in allowing by its decree of 19th May, 1885, as a lien prior to the lien of the first mortgage upon the road and property of the Rio Grande & Pecos Railway Company the claim of A. W. Wilcox, the appellee, for $5526.78.

IV. The learned Court erred in decreeing payment of the claim of the appellee out of the proceeds of sale of the Rio Grande & Pecos Railway Company, to wit, the sum of $5526.78 with interest, in preference to the lien of the first mortgage bondholders.

V. The learned Court erred in not awarding payment to the first mortgage bondholders in preference to the claim of the appellee.

ARGUMENT.

That the appellant here is the proper party to take and prosecute this appeal, has already been decided by this Court on a motion to dismiss this appeal.

Hassall v. Wilcox, 115 U. S., 598.

It is to be observed in the first place that there is no evidence whatever in the record that the bondholders were guilty of any laches. On the contrary, they proceeded with great promptness after the default was made to take possession of the mortgaged property. The default was in December, 1883, and the bill was filed and receiver appointed in April following, and not only is there no evidence that the receiver applied any part of the earnings of the property to betterments, but on the contrary, it affirmatively appears that the earnings were not equal to the running expenses which were made up out of the proceeds of the receiver's certificates.

(See Decree filed Dec. 10, 1884. Record, p. 60.)

The appellee's claim to preference over the mortgage creditors is not therefore within the rule of "Current debt fund," of which Fosdick v. Schall is a type, but is founded only on the statutes of Texas, and his claim to preference rests exclusively upon the statute hereinbefore recited.

For the purposes of this case it is not necessary to dispute the validity of the lien conferred by the Texas Statute of 1879, upon wage claims for labor done in the construction, repair and operation of a mortgaged railroad, nor that the benefit of this passes to the assignee of such claims, nor that the lien of the claim was not extinguished by the note taken by the appellee, and the judgment in the State Court entered thereon, but it is respectfully in-

sisted that the burden of proof is upon one claiming under such a statute a lien upon mortgaged property prior to the mortgage to show by affirmative proof each and all of the facts necessary to secure for his claim the preference given by the statute, and that as to so much of his debt as to which he offers no such affirmative proof, he can have no such preference.

Admitting that the judgment rendered by the District Court of Webb county is conclusive that the Rio Grande & Pecos Railway Company was on 27th March, 1884, indebted to the appellee in the sum of $5526.78, that judgment did not and could not establish a lien prior to that of the appellant's mortgage on a fund raised by decree of the Circuit Court of the United States for the Western District of Texas.

It does not purport to do so (see Record, p. 20), for there is nothing in the decree itself which purports to confer a lien as of a date prior to that on which it is entered, and it could not confer such lien as against the bondholders, who were not in any way parties thereto.

In a case very similar to this, where the claimants were mechanics' lien creditors claiming a lien upon a railroad prior to that of the mortgage bondholders, it was said by this Court:

"It is also to be observed that O'Hara & Co. and Webb, French & Co. had both commenced legal proceedings in the proper courts of the State to establish their liens before the present foreclosure suit was begun by appellants, and that in those courts, after a contest with the railway company judgments were rendered establishing their liens, and it was after this that they were made defendants to the present foreclosure suit.

"To these proceedings Barnes, the principal contractor, and the railway company, were parties, and we take it for granted that as against them the judgment of the State Court establishes the validity of the lien. *The ap-*

pellants (trustees under the mortgage) being no parties to these proceedings, are not bound by that judgment, and both the validity of the lien as against them, and whether the lien, if valid, is paramount to that of the mortgage, are the questions for consideration here. These questions must be determined by the statutes of Iowa as construed in regard to the facts of this case."

Brooks v. Burlington & Southwestern Ry. Co., *et al.*, 101 U. S., 443–445.

If, then, accepting the judgment of the Webb County Court as conclusive upon the railway company, the only defendant therein, as to the amount due the appellee, the plaintiff therein, we turn to the evidence to find the consideration upon which the debt was founded to ascertain whether any part, and if any, how much, of it is for wages due for labor done in the construction, repair and operation of the railroad, and therefore entitled to the lien conferred by the statute, we must agree with the learned master that there is no evidence upon which the appellee can sustain his claim to priority of payment over the mortgage creditors.

The burden of proof is upon him to show affirmatively that a sum certain is due him by the railway company as assignee of, or as subrogated to, the preferred claims for wages for labor done by mechanics, laborers and operatives within one year before the 14th of April, 1884, when the receiver was appointed—assuming upon the construction most favorable to him that the appointment of the receiver fixed his rights and relieved him from any further proceeding to enforce his claim.

The evidence produced by the appellee is stated by the master, Record, p. 44, and as to the consideration upon which the debt is founded will be seen to consist only of the note and warrant of attorney.

There, Record, p. 27, the consideration is stated to be "for services and for amounts advanced on claims for

labor performed in the construction and maintenance of the Rio Grande & Pecos Railroad."

Obviously so much of the claim as was for services is not within the protection of the statute; such statutes are uniformly held not to include or protect other than wage claims proper, and not salaries or compensation for services of officials and executive heads of departments or professional services; and Dr. Wilcox has not shown that he was either a mechanic, laborer or operative of the railway company.

As the right and the remedy are both given by statute the receiver must comply strictly with all the requirements of the statute to acquire and effectuate the lien.

2 Wood's Railway Law, § 293, p. 1026.

The Courts of Texas adopt and follow this general rule of construction, and have held a claim to a lien for labor performed by claimant's teams and servants to be not within the protection of the act of 1879.

T. & St. L. R. R. Co. v. Allen, 1 App. C. C., § 572, cited; 2 Sayles Tex. Civ. Stat., 3179, a, note (1).

As to so much of the debt as was for amounts advanced on claims for labor, the appellee has not given any evidence whatever to show what amount was advanced by him for such purpose, or when, or that the labor had been performed within the statutory period, or by what right he claimed the benefit of the statutory lien, whether by assignment or by subrogation, and if the latter, whether the circumstances under which he advanced the money were such as to entitle him thereto as against the mortgage creditors.

The appellee was himself examined, and he entirely failed, indeed did not attempt, to testify to any of the facts necessary to enable him to claim a preference over the mortgage creditors, but seems to have relied wholly upon the judgment of the Webb County Court, and when

the accounts, statements and vouchers are produced, examined and analyzed, we find that part of the consideration is certainly for merchandise, part for wages and supplies at the company's mines, and while part may be for wages for labor performed in the construction and maintenance of the company's railroad, only $382.21 out of the $5526.78 is affirmatively shown to be for such claims for labor performed within the statutory time and duly assigned to the appellee.

It is true that the presumptions are all in favor of the decision of the Court below, but in this case, where the whole evidence upon which that Court decided a mixed question of law and fact is before this Court, where no reasons are assigned for the decision rendered, and where that decision requires to support it affirmative and exact proof of all the circumstances necessary to entitle the claimant to the statutory preference demanded, and of the exact amount to be so preferred; and where as here, no one of these requisites is complied with except as to a very small part of the claim, this Court will take cognizance of and reverse for the error committed.

The burden of proof was on the appellee, the claimant below, and only to the extent of his claim affirmatively shown to be entitled to preference, to wit, $382.21 can he be preferred, and as to the remainder of his claim his lien must take rank as of the date of his judgment.

SILAS W. PETTIT,

Attorney for Appellant.

RAILROAD LABORERS' LIENS.

Act of the 18th of February, 1879, Chapter 12, page 8.

2d Sayles Texas Civil Statutes, page 3179.

An act to protect mechanics, laborers and operatives on railroads against the failure of owners, contractors and sub-contractors or agents to pay their wages when due, and to provide a lien for such wages.

SEC. 1. Be it enacted by the Legislature of the State of Texas, that all mechanics, laborers and operatives, who may have performed labor in the construction or repair of any railroad, locomotive, car or other equipment to a railroad, or who may have performed labor in the operating of a railroad, and to whom wages are due or owing, shall hereafter have a lien prior to all others upon such railroad and its equipment for such wages as are unpaid.

SEC. 2. In all suits for wages due by a railroad company for such labor as heretofore mentioned, upon proof being satisfactorily made that such labor had been performed, either at the instance of said company, a contractor or sub contractor or agent of said company, and that such wages are due, and the lien given by this act is sought to be enforced, it shall be the duty of the Court having jurisdiction to try the same to render judgment for the amount of wages found to be due, and to adjudge and order said railroad and equipments, or so much thereof as may be necessary, to be sold to satisfy said judgment; in all suits of this kind, it shall not be necessary for the plaintiff to make other lien-holders defendants thereto, but such lien-holders may intervene and become

parties thereto, and have their respective rights adjusted and determined by the Court.

SEC. 3. Suits by mechanics, laborers and operatives for their wages due by railroad companies, may be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which a principal office of such railroad company is situated, and in all such suits service of process may be made in the manner now required by law.

SEC. 4. The lien created by this act shall cease to be operative in twelve months after the creation of the lien, if no steps be sooner taken to enforce it.

SEC. 5. It being important that the benefits of this act be realized at once, because parties to be benefited by this act have no adequate protection under existing law, creates such imperative public necessity and an emergency as requires that it be of effect and force on its passage, and it is so enacted.

SEC. 6. That all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed.

OCT 26 1885
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

W. S. HASSALL, *Trustee*,

vs.

A. W. WILCOX *et al.*

No. 1,008.

Motions to Dismiss or Affirm.

W. HALLETT PHILLIPS,

For Appellees.

R. O. POLKINHORN & SON, PRINTERS, WASHINGTON, D. C.

In the Supreme Court of the United States.

W. S. HASSALL, *Trustee*,
vs.
A. W. WILCOX *et al.*
No. 1,008.

Motions to Dismiss or Affirm.

All of the appellees, except A. W. Wilcox, move the Court to dismiss the appeal as to each of them:

First, on the ground that the amounts involved in the decree appealed from, are not sufficient to give this Court jurisdiction;

Second, They further move the Court to dismiss the appeal or affirm the decree, on the ground that the appeal is improperly brought in the name of Hassall, trustee, and that it is manifest he has no interest in the decree.

The appellee, Wilcox, moves the Court to dismiss the appeal or affirm the decree as to him for the reasons stated in the second ground of the motion.

W. HALLETT PHILLIPS,
For Appellees

To GEORGE W. BIDDLE, Esq.,
Counsel for Appellant.

Take notice that the above motions will be submitted November 9, 1885.

W. HALLETT PHILLIPS,
For Appellees.

Brief of W. Hallett Phillips.

ON MOTIONS TO DISMISS OR AFFIRM.

On April 14, 1884, C. B. Wright filed his bill in the United States Circuit Court for the Western District of Texas, against the Rio Grande and Pecos Railway Company and the Mercantile Trust Company, of New York. The Trust Company was the trustee named in the mortgage given by the Railway Company to secure its bonds.

The complainant alleged that he was a holder of $121,000 of the first mortgage bonds, and that he filed the bill on behalf of himself and of all other creditors standing in the like position. That the Company had failed to pay the interest on its bonds, and that there was a large indebtedness outstanding for labor and material claims incurred for the construction and equipment of the road, which, under the laws of Texas, was entitled to a first lien upon the road, in preference to the first mortgage bond holders, for a period of twelve months after the completion of the same. That suits had been brought upon many of the claims, upon which judgments had been rendered, and executions issued, and unless relief was afforded, a large portion of the property would be diverted by sheriffs' sales, and the property thus separated, its aggregate value would be greatly impaired.

The bill also asked for the appointment of a receiver, on the ground that doubt existed whether the trustee, being a citizen of New York, could enter

upon and take possession of the property, as he was authorized to do by the mortgage. Rec. p. 1.

It also prayed that the rights of the complainant and all other creditors of the Railway Company might be ascertained and a decree should be entered directing the Company to pay the amount found due, and for general relief.

The Rio Grande and Pecos Railway Company, in its answer, made no defense. 13.

The Court, on April 14, 1884, appointed H. C. Smith receiver. 14. S. G. Newton was also appointed special master for the purpose of reporting upon all claims that should be presented to him, and all persons having liens or claims prior to the first mortgage bonds, or entitled to the preference of payment out of the proceeds of the road, were required to present the same before the master.

On June 24, 1884, A. W. Wilcox filed his claim, founded on a judgment obtained by him against the Railway Company for money, advanced by him to mechanics, laborers and operators, who had performed labor in the construction, repairing and operating of said road.

This judgment was claimed by Wilcox to constitute a lien on the road prior to that of the first mortgage bonds. 19.

The master, in his report, rejected the claim of Wilcox as a prior lien, and also reported adversely against a large number of labor and back pay claims.

As to these latter claims he held, that many of them were good and valid demands against the Rail-

way Company, which, under the strict construction given by the Texas courts to the railroad laborers' lien act, precluded him from reporting them as liens prior to that of the first mortgage bondholders. 43–4.

Exceptions were filed to this report. 45.

October 20, 1884, W. S. Hassall, who had been appointed by resolution of the directors as trustee in place of the Mercantile Trust Co., filed his petition, which was granted, asking that he be appointed a party complainant. 47.

The bill was at the same time dismissed, as to the Trust Company.

October 13, 1884, a decree was made by the court. By this it was declared that the liens decreed, or which should thereafter be decreed, to have preference as liens against the company prior to the holders of the first mortgage bonds, should have a prior lien on the road and the proceeds subject to the payment of the receiver's certificates, which were made the first lien.

In default of payment by the company of the amount declared due, a sale of the road was ordered to be made by W. S. Hassall, to whom authority for that purpose was conferred. The sale was to be subject to encumbrances, and provision was made in case the purchase was by the holders of receiver's certificates or by the first mortgage bondholders.

October 31, 1884, the court overruled so much of the master's report as rejected the claim of Wilcox as a lien prior to that of the bondholders, and

directed that the amount found due ($5,526.78 with interest), be paid by the receiver from proceeds of sale of receiver's certificates. In case of want of funds, the trustee or other person who should make sale of the road, was directed to pay the same out of the proceeds of sale, and the claim was ordered to stand as a charge and first lien on such proceeds to be paid in like manner as the receiver's certificates. 56.

The complainant, C. B. Wright, and W. S. Hassall, trustee, filed a petition for rehearing as to this claim. 57.

December 7, 1884, a rule to show cause was granted, modifying the decree in favor of Wilcox so as to permit a sale of the railroad free from all incumbrances, and rescinding so much of the decree as directed the payment of the claim out of receiver's certificate. 59.

December 10, a decree ordering a new sale of the road was made.

In this it is recited that the master had reported that claims to the amount of $52,391.84 had been presented to him, of which he had allowed $11,745,-56, and had rejected the balance, and that exceptions to this report had been filed and were still pending.

> "It appearing to the Court that unless an immediate sale of the railway is ordered its operations will have to be stopped, and that the sum of one hundred thousand dollars will cover the amount of the receiver's certificates, and also all of the claims of creditors claiming before the master, and whose claims have been reported by him, and it not appearing that any other

person interested in the property is willing to guarantee a bid of that or more than that amount; and it appearing by the offer of the first mortgage bondholders that they are willing, in case the property is forthwith exposed for sale free of and unincumbered of all liens whatsoever, to bid the sum of one hundred thousand dollars; and it appearing to the Court that a sale under the present decree of the Court would be at the present time impracticable,

"Now, therefore, it is hereby decreed that the property of the defendant mentioned in the decree heretofore made by this Court, bearing date October 13, 1884, be sold in the place and in the manner pointed out by said decree. * * And that the said decree be of full and binding force in all respects, saving as follows: That the sale shall take place on the 17th day of September, 1884, and that the sum at least of $100,000 shall be bid by some responsible party who shall be satisfactory for said sum to this Court." 61.

May 19, 1885, a decree was passed confirming a sale which had been made, and at which C. B. Wright (the complainant in the cause) had become the purchaser of the property.

It was further decreed

"That the report of the master upon all of the claims therein referred to, claiming priority on the property of the said Company over the lien of the first mortgage bondholders, be and are hereby consolidated so as to allow the following claims to the following parties, and as liens prior to the liens of the first mortgage upon the road and property of the Rio Grande and Pecos Railway Company.

(Here follows a list of forty claims of which that of A. W. Wilcox is the only one amounting to $5,000.)

"With interest on each of the several claims thus allowed from the day that each one of said several liens was contracted, respectively, at eight per cent. per annum."

It was further ordered that a re-hearing as to the claim of Wilcox should be denied.

W. S. Hassall, trustee, was ordered to pay the amount of the allowed claims from the proceeds of sale. After paying these and the receiver's certificates which had been allowed, the balance of the proceeds were to be distributed by Hassall for the benefit of the bondholders, provided, they gave security for the payment of certain undecided claims. 62.

Hassell alone has appealed from this decree.

(1.) It is plain that the appeal cannot be sustained as to the labor and pay claims which were established by the court in favor of the different appellees as liens on the railroad property and its proceeds, prior to that of the first mortgage bondholders.

No one of these claims amounts to $5,000.

This court has definitely decided in a similar case that no jurisdiction exists as to the claims under the jurisdictional sum.

Farmers' Loan & Trust Co. vs. *Waterman*, 106 U. S., 270.

There, as in the present case, a railroad was sold under decree of court, and a decree was made in favor of a large number of labor and supply claimants, by which the purchaser of the property was decreed to pay to the various claimants the several amounts set opposite their respective names.

The court, on the appeal of the purchasers and the trustee for the first mortgage bondholders, dismissed the appeal as to all the parties holding claims less than $5,000.

It was held, that each of the claimants had distinct causes of action, which, for convenience, were joined in one suit, and that distinct decrees were rendered in favor of the several parties, which could not be joined to give the court jurisdiction.

The court say:

> "There is a question involved common to all the intervenors; that is to say, whether back pay and supply claims of any kind are to be paid by the purchasers; but if that is settled in favor of the claimants, it will still have to be determined whether each one of the separate claimants has a claim of that kind. In determining this question, each claim will depend on its own facts. A recovery by one claimant will not necessarily involve a recovery by another. While the rights of all depend upon establishing a liability of the purchasers for the payment of debts of a particular kind, no one can recover unless he shows that there is owing to him individually a debt of that kind. There are, therefore, necessarily, in the case, as many separate and distinct controversies as there are separate claimants and intervenors."

(2.) As to the claim of Wilcox, which is over $5,000, Hassell, the mortgage trustee, has no right to appeal. In the language of the Court in the above cited case:

> "*The trust created by the mortgage was fully executed when the foreclosure was complete.* After that the purchasing bond-holders became purchasers of the mortgaged property and their rights are to be determined accordingly." 106 U. S. 269.

In this case, as in that, the purchase was made on behalf of the bondholders. Hassell, the mortgage trustee, was only named in the decree because he was appointed by the Court the trustee to make sale, and was ordered by the Court to make the distribution of the proceeds of sale.

Wright, the complainant in the cause, filed the bill on his own behalf and that of the other bond holders and purchased, on behalf of the bond-holders, the property in question.

He was the proper party to appeal if dissatisfied with the decree of the Court establishing the pay claims as liens on the proceeds of sale prior to that of the bondholders.

Nor, as said by this Court in the Waterman case, is it of any consequence that the right of appeal by the trustee was specially reserved.

For these considerations we submit that the appeal as to Wilcox, as well as the other appellees, should be dismissed or the decree should be affirmed.

W. HALLETT PHILLIPS,

For Appellees.

Office Supreme Court U. S.
FILED,
FEB 6 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

W. S. HASSALL, Trustee,
vs.
A. W. WILCOX.
} No. 68.

Brief of W. Hallett Phillips, for Appellee.

W. HALLETT PHILLIPS,
for Appellee.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

W. S. HASSALL, Trustee,
vs.
A. W. WILCOX.
No. 68.

Brief of W. Hallett Phillips, for Appellee.

The controversy is between the appellant, who is trustee of the first mortgage bond-holders of the Rio Grande and Pecos Railway Co., and the appellee ~~last~~, who claims to have a superior lien on the proceeds of sale of the property owned by the company and sold under the decree of the United States Circuit Court for the Western District of Texas.

It is from the decree of that Court, awarding priority to the appellee, that the appellant appeals. The decree also awarded priority to some thirty-nine other claims, but the appeal was at the last term dismissed as to all claims, except that of Wilcox, because no one of them was in amount sufficient to give this Court jurisdiction.

Hassall vs. *Wilcox*, 115 U. S., 599.

The Rio Grande and Pecos Railway Co. was a corporation of Texas, principally engaged in the operation of coal mines owned by it, and the business of the company consisted largely in the transportation of the coal to market. In the operation of the road, no distinction was made as to the accounts of the mines and those of the road proper; the whole was operated as one business. (Rec., 1.)

The bill under which the road was finally sold was originally filed by one of the bond holders, and the trustee was afterward made a party. It sought the appointment of a receiver and the enforcement of the mortgage.

As ground for the interference of the court below, the bill of complaint avers:

"That the Rio Grande and Pecos Railway is at present insolvent and unable to meet the interest on its fixed charges or its ordinary debts and obligations, and that its road and franchises and rolling stock are all liable to be swept away upon liens or judgments, which, under the laws of the State of Texas, are prior to the liens of the mortgage bonds held by your orator, and that the same will be swept away unless prevented by the action of this Honorable Court, in which case the whole of the property, which is of great value and extent, would be destroyed, not only so far as its usefulness to the public is concerned, but so far as it is a security or pledge to the holders of the mortgage bonds above mentioned, so there is urgent necessity for the interference of this Honorable Court, to protect the property from suits and executions, and to preserve it as a whole, so that its business may be continued to be carried on and its income and assets applied to the payment of its debts in due order for the general advantage of all its creditors, and more especially to

enable provision to be made by the first mortgage bondholders for the discharge and payment of the obligations held by laborers and material men and others who, under the laws of Texas, were entitled to a lien upon the property prior to that of the first mortgage bondholders." R., 3.

Under the prayer of the bill, the Court appointed a receiver, and ordered a reference to a master for ascertainment of the indebtedness and the priority of the liens.

Under this reference, Wilcox and others presented their claims, but the master refused to accord them a prior lien under the Texas statute over the mortgage, but reported the same to the court, to the end that should a lien be decreed under the equitable powers of the court, they might be passed on without further reference. R., 44.

The court held that the claim of Wilcox constituted a prior lien, and ordered its payment by the receiver out of the proceeds of receiver's certificates, which had been authorized to be issued.

The priority of liens was then established, and a sale decreed subject to such liens. Afterwards, the order directing the payment by the receiver of the claim of Wilcox was modified, and the road ordered to be sold free of encumbrances. At the sale it was purchased by Wright, the bondholder who was the original complainant.

The proceeds of sale having been paid into court, distribution of the same was ordered and payment to Wilcox prior to any payment to the bondholders. From this decree the trustee of the bondholders alone appealed, and the single question now

remaining for consideration is whether, in point of law, Wilcox was entitled to priority out of the proceeds of the sale of the property.

It is immaterial whether such priority is rested on the statute of Texas, or the general equitable powers of the Court; in either point of view, we submit that the decree should stand.

The claim of Wilcox primarily arose from advances made by him for the payment of claims for labor in 1883-'84, performed for the company, the time checks being transferred to him.

The road was at the time in great pecuniary distress and the laborers were clamorous for their pay.

On January 12, 1884, the company delivered to Wilcox its note for $5,526.75, the same representing the payments made by him, and he delivered to the company all the time checks and vouchers held by him, it being agreed that he should still preserve his lien.

To enforce this lien he filed his petition in the District Court of Webb County, Texas, and on March 27, 1884, recovered judgment against the company and it was "further ordered by the Court that the plaintiff have a lien on the said Rio Grande and Pecos Railroad Company and its equipments to secure the payment of this judgment, and that such railroad and its equipments, or so much thereof as may be necessary, be sold to satisfy this judgment."

(R., 24, 20.)

The bill of the bond-holders was filed April 14, 1884.

The mortgage was made May, 1882.

At that time the act of Texas of February 18, 1879, was in force. This provides—

Act of the 18th of February, 1879, Chapter 12, page 8, 2d Sayles Texas Civil Statutes, p. 3179.

An act to protect mechanics, laborers and operatives on railroads against the failure of owners, contractors and sub-contractors or agents to pay their wages when due, and to provide a lien for such wages.

SEC. 1. Be it enacted by the Legislature of the State of Texas, that all mechanics, laborers and operatives, who may have performed labor in the construction or repair of any railroad, locomotive, car or other equipment to a railroad, or who may have performed labor in the operating of a railroad, and to whom wages are due or owing, shall hereafter have a lien prior to all others upon such railroad and its equipment for such wages as are unpaid.

SEC. 2. In all suits for wages due by a railroad company for such labor as heretofore mentioned, upon proof being satisfactorily made that such labor had been performed, either at the instance of said company, a contractor or sub-contractor or agent of said company, and that such wages are due, and the lien given by this act is sought to be enforced, it shall be the duty of the Court having jurisdiction to try the same to render judgment for the amount of wages found to be due, and to adjudge and order sail railroad and equipments, or so much thereof as may be necessary, to be sold to satisfy said judgment; *in all suits of this kind, it shall not be necessary for the plaintiff to make other lien-holders defendants thereto, but such lien-holders may intervene and become parties thereto, and have their respective rights adjusted and determined by the Court.*

SEC. 3. Suits by mechanics, laborers and operatives for their wages due by railroad companies, may be instituted and prosecuted in any county in this State where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which a principal office of such railroad company is situated, and in all such suits service of process may be made in the manner now required by law.

SEC. 4. The lien created by this act shall cease to be operative in twelve months after the creation of the lien, if no steps be sooner taken to enforce it.

The judgment of Wilcox was opposed before the Master alone by the complainant Wright, one of the bond-holders, and such opposition was on the ground of fraud and collusion. It was stated that complainant Wright had filed his suit in the District Court of Webb county, to have the judgment annulled. (R., 23.)

As this application for setting aside the judgment does not subsequently figure in the case, we must presume that nothing came of it.

It is not contended in the present argument that the judgment was in any way affected by fraud, nor is it denied that the same constituted a valid claim against the company, and that Wilcox was entitled to the same lien as that held by the parties whose claims had been discharged with his money. The only error now assigned is that the court below should have subordinated the claim to that of the bond-holders, and to this issue alone is attention requisite.

The objection seems to be rested on the ground that items were included in the judgment not properly entitled to liens. This objection disregards the judgment and renders it of no force as establishing a lien on the property of the company.

At the time of that judgment the State Court had full jurisdiction over parties and subject-matter. The road was still a going concern, and the creditor had a right to proceed against it and the Court had the power to decide the debt to be a lien and to order a sale of the property to satisfy the same. It had necessarily to pass upon the fact whether the claim as alleged could constitute a lien under the Texas law, and having decided affirmatively it necessarily followed that it was a lien prior to all others. This was the lien the statute gives and to enforce which the suit was instituted.

The statute is one applicable to all cases arising subsequent to its passage. It therefore governs the rights of the parties in the present case, as the mortgage under which the appellant claims was not made until three years thereafter.

The statute became part of the mortgage contract, and it was made subject thereto, not only as regard the question of priority but also the mode of procedure to enforce the same. The statute made the liens established under it binding notwithstanding other lien holders were not made parties, and gives them the right to intervene. If the trustee of the mortgage bond-holders preferred not to intervene, or if he did intervene but was unsuccessful, in either case the judgment is binding on him and on the property.

As we have seen the remedy which the statute gave the bond-holders was resorted to, but it must be presumed ineffectually.

Undoubtedly if the bond-holders had not filed their bill in the United States Court, the State Court would have proceeded to sell the property to satisfy the judgment of Wilcox, and it was to prevent this that the bill was filed, and it contains a recognition of the priority of the judgment lien, under the laws of Texas.

The judgment, however, was not displaced by the proceedings in the United States Court. It followed the property and bound the proceeds of sale.

Were we to assume that the judgment of the State Court could be assailed collaterally, the question would still remain whether the court below was not justified in treating the claim as entitled to priority under its general equitable powers.

That the claim is a highly meritorious one is not disputed, nor is it denied that it is valid as against the road.

It should therefore be very clearly made to appear that the court below committed "an abuse of judicial discretion," before this court can be called upon to reverse the action of the court below in providing for the payment of the claim out of the proceeds of sale of the road.

At the time of the payments by Wilcox and the date of the note given to him by the company, the latter was in the full possession and operation of its property. There had been no intervention or action taken by the bond-holders. The money was paid by Wilcox for the express purpose of enabling the com-

pany to continue to operate and to discharge expenses accruing a few months before the bill to enforce the mortgage was filed. It was therefore a payment not only for the benefit of the road but also for the benefit of the parties whose security the property was.

The funds of the company which should have been applied to discharging such operating expenses were diverted to other purposes of the company, and, it is fair to conclude, constituted part of the means by which the interest on the mortgage-debt was paid. The bill only alleges one default in payment of interest, that immediately preceding the filing of the bill. But irrespective of this fact, which is not controlling, the money of Wilcox went into the property, and it would not be equitable to allow the bondholders to reap the enhanced value and disregard the obligation of the company.

The court below as a condition of appointing a receiver, had the right to order him to pay outstanding liabilities superior to the lien of the bondholders.

This right it exercised in the order appointing the receiver, and subsequently when it ordered the receiver to pay the claim of Wilcox. The revocation of that order, only changed the mode of payment so that it should be made from the proceeds of the sale of the property.

Whether such a payment should be made from the income of the road in the possession of the Court, or from the *corpus* of the property or from the proceeds of its sale, does not affect the power of the Circuit Court to order such payment.

As has been said by this Court, the question whether such an order is justifiable must depend upon the circumstances of each case.

Appellee submits that his claim clearly falls within the line of those which have met with the confirmation of this Court, in the cases recently decided on the subject.

Fosdick vs. *Schall*, 99 U. S., 235;
Jeffrey vs. *Moran*, 101 U. S., 285;
Union Trust Co. vs. *Souther*, 107 U. S., 591;
Union Trust Co. vs. *Walker*, *Id.* 596;
Burnham vs. *Bowen*, 111 U. S., 777;
Union Trust Co. vs. *Morrison*, 125 U. S., 607.

The appellant realizes that if he is allowed to assail the judgment of the State Court in this proceeding, it devolves upon him to show in what particulars that judgment is erroneous.

He endeavors to show such error, by producing accounts and other testimony to establish that some items, which he says were embraced in the note upon which the judgment was recovered, could not properly constitute liens.

It would seem that if the judgment was of any effect at all even as against the company, the fact that the claim was of such a nature as could be entitled to a lien as against the road, was a fact which was concluded by the judgment. It lay at the foundation of the proceeding, and cannot be disputed by the appellant. Under the most liberal view, the only questions which he should be allowed to dispute are whether the lien was established in consonance with law, and whether superior to that represented by him.

The appellant controverts the allegation made by Wilcox, in his petition in the State Court, that the claims he represented were for labor on the Railroad, and also the judgment of that Court, holding he was entitled to a lien. He undertakes to show that in point of fact other items than labor claims on the railroad were embraced in the note sued on by Wilcox. As evidence of this he offers the accounts. Assuming that he is at liberty to do this, what is his ground of complaint?

It seems, in the main, to be that those accounts evidenced that some payments were made by Wilcox on account of labor performed on the mines of the Company, and the point is made that the Texas law confers no lien for labor of such a nature.

But the Court cannot disregard the peculiar composition of the company, for which the services were rendered. It must assume as true the allegations contained in the bill filed by the bond-holders to enforce their mortgage on the property of the Company.

The bill alleges that "The Rio Grande and Pecos Railway Company, defendant, is the owner of very extensive and valuable coal lands in Webb County in the State of Texas, and has recently constructed a railroad in the State of Texas from Santo Tomas to Loredo. The business of said Company is that of a railway and transportation company and of a miner of coal. There has recently been expended a very large amount of money upon opening the coal beds and erecting the necessary appliances for mining and transporting the same to market, and the principal business upon the railroad is the transportation of the coal thus mined. The value of the assets consists largely in the fact that the coal

mines and the railroad appurtenant thereto are owned by the same corporation, and any separation of the two properties of the company would be fraught with disaster to its creditors and lessen the aggregate value of the two materially." (Rec., 2.)

It thus appears that the value of the security consisted largely in the coal property, and that the railroad and the mines were operated as one concern.

If, therefore, it were true that any part of the money paid by Wilcox was on account of the mines, it is difficult to discern upon what principle of Equity the mortgage bond-holders should be allowed to enforce their mortgage on the whole property, and escape from the payment for labor performed on a part of it, and which added value to the whole. Even under the Texas Statute, it would be very narrow construction to hold that the Court must throw out claims for operating the mines, and make a separation of the property which the owners and mortgagees themselves had not made. Such a construction would operate with great harshness and injustice upon a large and deserving class of claimants in whose favor lien laws are liberally construed.

We submit that the appellant has wholly failed to show that the claim of appellee was not entitled to preference, and the decree below should be affirmed.

W. HALLETT PHILLIPS,
for Appellee

Office Supreme Court U. S.
FILED.
NOV 23 1885
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States

HASSALL
vs.
WILCOX, *et al.*
No. 1,008.

Motions to Dismiss or Affirm.

BRIEF FOR APPELLEES IN REPLY TO MR. BIDDLE.

1. As to the amount in controversy.—

It is urged that the appeal is sustainable as to the labor and supply claimants, to each of whom amounts below $5,000 were decreed, because the case is one involving the distribution of a fund; that the proceeds of sale of the railroad were claimed by the first mortgage bondholders to the exclusion of the laborers and supply claimants.

We submit that the facts of the present case do not distinguish it from that of *Farmers' Loan and Trust Co.* vs. *Waterman*, previously cited.

It was contemplated from the commencement of the suit, that the road would be sold. In the order

appointing a special master, he was directed to give notice to all persons asserting any liens upon the road prior to that of the first mortgage bondholders, and entitling them to preference of payment "out of the *proceeds of said road*." p. 18.

The decree appealed from allowed the claims "as liens prior to the lien of the first mortgage *upon the road and property of the Rio Grande and Pecos Railway Company*." (p. 62.)

The liens being thus established, the payment of the claims necessarily was directed to be made out of the proceeds of sale of the road, prior to any payment to the bondholders.

What is really complained of, on this appeal, is the decree establishing a priority of lien on the road in favor of each of the laborers and supply claimants whose claims were allowed.

The fact that the road was sold at the time of the decree is of no consequence. The proceeds of sale stood in the place of the road.

As was said in the Waterman Case, each of these claimants had a distinct cause of action. The amount of the recovery of one was not effected in any manner by what was allowed to another. Distinct decrees were rendered in favor of the distinct parties. The claimants sought to establish and enforce their respective liens. 106 U. S., 271.

The appellant might have opposed the allowance of any one of the claims, as a prior lien, on grounds peculiar to that claim. As a matter of fact, both the appellant and Wright, who filed the bill, did oppose separately the claim of Wilcox. (p. 57.)

The principle announced in the Waterman Case, has frequently been applied to cases similar to the one now before the Court.

Thus, in *Schewd* vs. *Smith*, several creditors having claims, each one of which was less than the jurisdictional sum, united in a bill to set aside a judgment, under which property of the debtor, had been levied on by the defendant.

Pending the suit the property levied upon was sold, and the proceeds, amounting to over $5,000, *paid into Court.*

There was a decree in favor of complainants, and an appeal by the defendant, w*ho claimed the whole proceeds of* sale. The appeal was dismissed. The Court held that the complainants below had each recovered a decree against the defendant, setting aside his judgment so, far as it effected them individually. Had they been defeated they could not have appealed, because, although allowed in equity to join in their suit, they had "separate and distinct interests depending on separate and distinct judgments." That if the decree was several as to the creditors, it was several as to their adversaries. The theory was that although the proceeding was in form but one suit, its legal effect was the same as though separate suits had been begun on each of the separate causes of action.

> "Although the effect of the decree is to deprive Heller (the appellant) of more than $5,000, it has been done at the suit of several

parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense."

106 U. S., 190.

The two cases of *Market Co.* vs. *Hoffman*, 101 U. S., 112, and *The Mamie*, 105 U. S., 773, are relied on to defeat the motion. They stand on an entirely different principle, as explained in *Ex-parte* Baltimore & Ohio R. R. Co., 106 U. S., 6.

2. As to the failure of Wright to appeal.

It is said that Hassall was *substituted* as party complainant.

The order actually made was one permitting Hassall to be *made a party complainant* in the bill filed by Wright on behalf of himself and all other first mortgage bondholders. Thereafter, the suit was continued in the name of Wright and Hassall, until final decree.

Hassall was appointed special master to make sale of the road, and in that capacity received from the purchaser the purchase money.

It is asserted that the trust created by the mortgage was not fully executed when the foreclosure was complete, and for this reference is made to the terms of the mortgage.

But the provisions of the mortgage, plainly, only apply to a sale made by the trustee under the powers of the mortgage, and do not apply to a sale by a court under a proceeding for foreclosure.

Nor do we contend, as alleged in the brief, that a mortgage trustee never has a right to appeal after a foreclosure and sale.

The point here is, whether he has a right to appeal when the foreclosure suit is instituted by the bondholders themselves, or by one of their number, suing in behalf of all, and where such bondholders do not appeal.

The appeal should be dismissed.

W. HALLETT PHILLIPS,
For Appellees.

In the Supreme Court of the United States.

William S. Hassall, Trustee, Appellant,	Of October Term, 1885.
vs.	No. 1008.
A. W. Wilcox et al., *Appellees.*	

SUR MOTION TO DISMISS OR AFFIRM.

The appellant shows to the court: That in answer to a motion to affirm or dismiss in the above case, he filed with the court on November 16th, 1885, his brief of argument against the motion, notice having been previously served on him that the motion would then be heard.

That on that day, the motion having been called up by the appellant, the counsel for the appellees, being present in court, stated that he did not want to press it then, as he had had no opportunity to read the counter-argument of appellant's and declined to call it up, asking leave to postpone it until he had read the appellant's brief, which postponement was allowed by the court.

That counsel for the appellees, although requested to do so, has since refused to give appellant notice of the time at which he intends to call up or submit said motion to the court, so as to enable the appellant's counsel to be present, and has further stated that he has it under advisement to present, without any notice or service thereof upon appellant's counsel, a further printed brief of argument on behalf of his clients other than and in addition to that already served upon him by appellant's counsel under Rule 6.

The appellant therefore protests and objects to any submission of the motion to dismiss or affirm without reasonable notice thereof being first given to him, and also to the presentation upon the submission of such motion of any further printed brief of argument or statement by appellees, without three weeks' additional notice, and a copy of such brief in reply being first served upon him, as provided by section 4 of Rule 6 of this court.

GEORGE BIDDLE,
with whom is, JOHN J. WILKINSON,
Of Counsel for the Appellant.

NOVEMBER 21ST, 1885.

In the Supreme Court of the United States.

William S. Hassall, Trustee, Appellant,	
vs.	Of October Term, 1885, No. 1008.
A. W. Wilcox et al., *Appellees.*	

Appeal from decree of the Circuit Court of the United States for the Western District of Texas.

UNITED STATES OF AMERICA,
STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } *ss.*

JOHN J. WILKINSON, being duly sworn, says that he is a member of the bar of this court, and resides and is practicing law in Philadelphia, Pennsylvania, and is counsel of record in the court below of William S. Hassall, trustee and appellant.

That he appeared before this court on the sixteenth day of November, 1885, in answer to a notice of a motion to dismiss or affirm in the above case, and filed a brief of argument in reply to such motion with the clerk of this court.

That W. Hallett Phillips, Esq., on the same day appeared for the motion and asked leave of the court to postpone its consideration for the present, as the appellants' brief of argument had only been that day filed, and he had no opportunity of examining it, to which no objection was made by appellant, and the postponement was granted by the court.

That the deponent subsequently upon the same day, called upon Mr. Phillips at his office in Washington, and inquired of him when the motion would again be called up by the appellees. Mr. Phillips declined to say when he would call the motion up, saying that he desired to read appellant's answer to the brief originally filed on behalf of the motion, and he did not know whether he would reply or not. Mr. Phillips further refused to send appellant a copy of his brief in advance of the day upon which he again called up the motion, or to notify him of the time at which he proposed on behalf of the appellees to submit the same to the court, stating that he had the right to submit the case with a printed reply to appellant's brief, if he saw fit to file one, at any time, without further notice to the appellant or his counsel.

The counsel for appellant thereupon, on November 18th, 1885, mailed a letter directed to W. Hallett Phillips, Esq., care Phillips, Maury & Phillips, Washington, D. C., of which the following is a copy, and sent a telegram to W. Hallett Phillips, Washington, D. C., of which a copy is also annexed, at 10 o'clock A. M., on Saturday, November 21st, 1885, to neither of which any answer has as yet, Saturday, November 21st, 11.30 A. M., been received.

COPY OF LETTER.

208 SOUTH FIFTH STREET,
PHILADELPHIA, November 18th, 1885.

DEAR SIR:—I am surprised to learn from my colleague, Mr. Wilkinson, that you have declined to notify me upon what day you intend calling up the motion to dismiss and affirm in the above case (which you omitted to call up on Monday the 16th, the day for which you had notified me), and that you have it under advisement to hand up to the court when you do call the motion up, an additional printed argument other than the one served upon me, without first submitting a copy to me. I beg to notify you that I claim the right under Rule 6 to have the motion to dismiss disposed of within a reasonable time, or else withdrawn, and also to object to any argument

other than the one already served upon me being handed to the court without three additional weeks' notice to and service of it upon me. This claim I intend maintaining before the court.

For this purpose I beg you to let me know whether I understand your position aright, as if so, I wish to move the court upon Monday next, the 23d inst., to have an early day set for the final disposition of the motion, upon the record and arguments already filed with the clerk, and no others.

I am, very respectfully, yours,

GEORGE BIDDLE.

W. HALLETT PHILLIPS, ESQ., Washington, D. C.

COPY OF TELEGRAM.

PHILADA., November 21st, 1885.

W. Hallett Phillips, Esq., Attorney-at-Law, Washington, D. C.

May I expect an answer to my letter of 18th inst. Wire at my expense.

GEORGE BIDDLE.

Sworn to and subscribed this 21st day of November, A. D. 1885, at 11.40 A. M., before me, a notary public for the State of Pennsylvania, in and for the said city and county.

JOS. J. KNOX,
[SEAL] *Notary Public.*

JNO. J. WILKINSON.

Since the foregoing affidavit was made the following telegram has been received from Mr. Phillips:—

"WASHINGTON, D. C., Nov. 21st.

"*George Biddle, Phila.:*

"Will submit motion Monday.

"W. HALLETT PHILLIPS."